

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 29 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0379-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DONNELL THOMAS,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20023124

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Donnell Thomas

Winslow
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 A jury found petitioner Donnell Thomas guilty of aggravated assault and armed robbery. At sentencing, the trial court found he had three historical prior felony convictions, including a 1970 conviction for murder. The court sentenced him to a mitigated, twenty-one-year prison term for armed robbery and a concurrent, presumptive, 11.25-year term for

aggravated assault. We affirmed the convictions and sentences on appeal. *State v. Thomas*, No. 2 CA-CR 2003-0155 (memorandum decision filed Oct. 26, 2004).

¶2 Thomas then filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., and the trial court appointed counsel. Unable to find any colorable post-conviction claim to raise, counsel filed a notice of review pursuant to Rule 32.4(c)(2). The trial court allowed Thomas to file a *pro se* petition as authorized by Rule 32.4(c)(2); *Lammie v. Barker*, 185 Ariz. 263, 264, 915 P.2d 662, 663 (1996); and *Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995). The trial court's summary dismissal of Thomas's petition and denial of his subsequent motion for rehearing gave rise to the present petition for review. We will not disturb the trial court's ruling "unless an abuse of discretion affirmatively appears." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶3 In his petition below, Thomas claimed trial counsel had been ineffective in failing to file pretrial motions to challenge the grand jury proceeding and what Thomas labeled a duplicitous indictment, failing to challenge or defend against the aggravated assault charge, and failing to challenge a prior conviction used to enhance his sentences. He also claimed the trial court had lacked jurisdiction to treat his prior conviction for an open-ended offense as a felony conviction for sentence-enhancement purposes and had thus erred at sentencing. The state did not file a response, despite having obtained an extension of time in which to do so.

¶4 The trial court ruled Thomas had failed to show that any of his complaints about trial counsel's performance actually amounted to deficient representation. Additionally the court found Thomas had failed to show prejudice, the second of the two elements necessary for any colorable claim of ineffective assistance of counsel. *See State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Finally, the court ruled Thomas's sentencing claims were precluded under Rule 32.2(a)(2) as having already been raised and decided on appeal.

¶5 We cannot say the trial court abused its discretion. Because Thomas's ineffective assistance claims are essentially the same issues raised on appeal reframed as deficient performance by counsel, our previous substantive rejection of those claims means Thomas could not establish prejudice even if he had shown trial counsel's representation fell below the prevailing professional standard of care. Inability to show prejudice is fatal to an ineffective assistance claim. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) ("If no prejudice is shown, the court need not inquire into counsel's performance.").

¶6 Because the trial court's minute entry clearly identified, thoroughly discussed, and correctly resolved Thomas's claims, we need not expand upon its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court['s] rehashing the trial court's correct ruling in a written decision"). To the extent Thomas has inserted in

his petition for review a new complaint about counsel's comments during closing argument, we do not address it. This court will not consider on review any issue on which the trial court has not first had an opportunity to rule. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶7 Finding no abuse of the trial court's discretion in denying post-conviction relief, we grant the petition for review but deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge